

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	Civil Action
Plaintiff,)	
)	
vs.)	No. 02-CV-09475
)	
ROBERT G. COOK and)	
SHARON M. COOK,)	
)	
Defendants.)	

* * *

APPEARANCES:

IVAN C. DALE, Assistant United States Attorney,
On behalf of Plaintiff United States of America

DAVID S. BRADY, ESQUIRE,
On behalf of Defendants Robert G. Cook and
Sharon M. Cook

* * *

OPINION

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Rule 12(b)(1) and (6) Motion to Dismiss Complaint, which motion was filed by defendants on April 14, 2003, and the United States' Cross-Motion for Summary Judgment, which cross-motion was filed June 3, 2003. For the reasons expressed below, we deny defendants' motion, and we grant plaintiff's motion. We enter judgment as follows: 1) in

the amount of \$1,536,787.13 in favor of plaintiff United States of America ("Government") and against defendant Robert G. Cook for the trust fund liability alleged in Count I of the Complaint pursuant to 26 U.S.C. § 6672; 2) in the amount of \$191,706.61 in favor of the Government and against defendant Robert G. Cook for the trust fund liability alleged in Count II of the Complaint pursuant to 26 U.S.C. § 6672; and 3) in the amount of \$35,138.63 in favor of the Government and against defendants Robert G. Cook and Sharon M. Cook, jointly and severally, for the joint income tax liability alleged in Count III of the Complaint.

PROCEDURAL BACKGROUND

Plaintiff commenced this action on December 27, 2002 by filing a Complaint alleging three counts of tax recovery. In its Complaint, plaintiff alleges federal question jurisdiction pursuant to 28 U.S.C. § 1331. In Count I of its Complaint, plaintiff seeks to reduce to judgment the assessment of a civil penalty pursuant to 26 U.S.C. § 6672 against Robert G. Cook related to the trust fund tax delinquencies of Sharob Associates, Inc. ("Sharob Associates"). In Count II, plaintiff seeks to reduce to judgment the assessment of a civil penalty pursuant to 26 U.S.C. § 6672 against Robert G. Cook related to the trust fund tax delinquencies of Sharob Management Company, Inc. ("Sharob Management"). In Count III, plaintiff seeks to reduce to judgment three tax assessments against both Robert G. Cook and

Sharon M. Cook for their joint income tax delinquencies related to the tax years ending December 1995, December 1997, and December 1999.

On April 14, 2003, defendants filed their Rule 12(b)(1) and (6) Motion to Dismiss Complaint. On June 3, 2003, plaintiff filed a brief in opposition to defendants' motion as well as the United States' Cross-Motion for Summary Judgment. Defendants filed the Answer of Defendants to United States Cross Motion for Summary Judgment on August 5, 2003, to which plaintiff responded by filing the United States' Reply Brief re: Cross-Motions for Summary Judgment on August 27, 2003.¹

On September 3, 2003, the court conducted a Rule 16 status conference by telephone conference call. During that conference, the court set a discovery and briefing schedule at defendants' request allowing the parties the opportunity to file supplemental briefs by January 9, 2004. Pursuant to that conference, the parties filed the Defendants' Brief on Motion for Summary Judgment and on United States' Cross Motion for Summary Judgment Submitted on or before January 9, 2004 per Court Order, the Supplemental Statement of Facts and Exhibits in Support of United States' Cross-Motion for Summary Judgment, and the Supplemental Memorandum of Law in Support of United States' Cross-Motion for Summary Judgment on January 9, 2004. On

¹ The court granted plaintiff leave to file a reply brief by Order dated August 21, 2003.

February 16, 2004, defendants filed the Response of Defendants to Plaintiff's Supplemental Statement of Facts and Exhibits on United States' Cross-Motion for Summary Judgment, as well as Defendants' Concise Statement of Facts Opposing the United States' Cross Motion for Summary Judgment.

The court heard testimony and argument on January 21, 2004 and February 25, 2004 on the limited issue of the duress alleged by defendants in seeking to invalidate the waivers they signed, which extended the collection periods on their tax liabilities. At the conclusion of that hearing, the court invited defendants to file a brief on the issue of their entitlement to attorney's fees. The court also invited both parties to submit briefs on the calculation of interest and penalties.

Pursuant to the court's invitation, plaintiff filed the Supplemental Declaration of Belinda Huber on March 3, 2004. Also on March 3, 2004, defendants filed Defendants' Demand for Attorneys Fees for Defense of Suit by United States, as well as Defendants' Statement Concerning Amounts of Taxes, Penalties and Interest Pursuant to the Court's Instructions. The Government filed the Second Supplemental Declaration of Belinda Huber on March 12, 2004.

We now deny defendants' motion to dismiss the Complaint and grant plaintiff's cross-motion for summary judgment.

FINDINGS OF FACT

Based on the pleadings, record papers, depositions, declarations and exhibits of the parties, as well as on the evidence presented at the hearings held on January 21, 2004 and February 25, 2004, we make the following findings of fact:

1. The Historic Strasburg Inn ("Inn") operated as a lodging and entertainment complex in Strasburg, Pennsylvania, consisting of a 103-room hotel, three retail shops, and a restaurant.²

2. Defendant Robert G. Cook acquired a beneficial interest in the Inn in 1978 by purchasing a controlling share of the stock of Historic Strasburg, Inc. ("HSI").³

3. Beginning in 1978, Mr. Cook served as President and General Manager of the Inn, overseeing its daily operations; the hiring and firing of employees; the payment of wages; and the withholding of taxes, unemployment, and social security benefits from employee paychecks.⁴

4. The amounts withheld from the paychecks of the Inn's employees were not deposited in any separate account.⁵

² Robert G. Cook Deposition of September 29, 2003 ("R. Cook Dep."), at pages 52-53, Exhibit 1 to Supplemental Statement of Facts and Exhibits in Support of United States' Cross-Motion for Summary Judgment, filed January 9, 2004 ("Plaintiff's Supplemental Statement").

³ Id. at 53-54.

⁴ Id. at 15, 54-55.

⁵ Id. at 55.

5. HSI incurred substantial tax liabilities; and Mr. Cook was personally assessed \$319,192.20 for the willful failure to collect, account for, and pay over taxes required to be collected in the tax period ending December 31, 1983.⁶

6. On November 21, 1983, Historic Realty, Inc. ("HRI") was formed for the purpose of purchasing and holding the real and personal property of HSI.⁷

7. On November 21, 1983, Sharob Associates was formed to operate the business of the Inn, including its restaurant, motel, and shops.⁸

8. On November 21, 1983, Sharob Management was formed to manage a country store and an ice cream parlor affiliated with the Inn.⁹

9. Robert Cook was the responsible officer of Sharob Associates and Sharob Management from their inceptions to their dissolutions. He maintained ultimate authority over the hiring and firing of employees and determined which of the entities' debts were paid.¹⁰

⁶ 198312 Individual Master File of Robert Cook, Exhibit 8 to Plaintiff's Supplemental Statement.

⁷ R. Cook Dep. at 68, 77-79, Exhibit 1 to Plaintiff's Supplemental Statement; HRI Second Amended Disclosure Statement ("Second Amended Disclosure") at 4, Exhibit 9 to Plaintiff's Supplemental Statement.

⁸ R. Cook Dep. at 56-57, Exhibit 1 to Plaintiff's Supplemental Statement; Second Amended Disclosure at 4, Exhibit 9 to Plaintiff's Supplemental Statement.

⁹ R. Cook Dep. at 56-58, Exhibit 1 to Plaintiff's Supplemental Statement.

¹⁰ Id. at 56-57, 60-61.

10. Sharob Associates struggled financially, and Mr. Cook used for other purposes funds which should have been used to pay withholding taxes.¹¹

11. As a result, Sharob Associates incurred federal payroll tax liabilities in 1984 and 1985, reported on Form 941, Employer's Quarterly Federal Tax Return, as follows:

<u>Tax Quarter Ending</u>	<u>Assessed Tax & Penalties</u>	<u>Federal Tax Deposits</u>	<u>Assessed Balance, Exclusive of Interest</u>
March 1984	\$52,520.00	(\$0.00)	\$52,520.00
June 1984	\$78,153.76	(\$31,992.82)	\$46,160.94
Sept. 1984	\$61,741.77	(\$59,299.42)	\$2,442.35
Dec. 1984	\$84,934.99	(\$0.00)	\$84,934.99
March 1985	\$72,643.63	(\$0.00)	\$72,643.63
June 1985	\$93,684.05	(\$0.00)	\$93,684.05
Sept. 1985	\$78,979.73	(\$0.00)	\$78,979.73
Dec. 1985	\$103,714.63	(\$0.00)	\$103,714.63 ¹²

¹¹ Id. at 77-79; Second Amended Disclosure at 5, Exhibit 9 to Plaintiff's Supplemental Statement.

¹² Forms 4340, Certificates of Assessments, Payments, and Other Specified Matters, Sharob Associates, Exhibits 11-18 to Plaintiff's Supplemental Statement.

12. Sharob Management also incurred federal payroll tax liabilities in 1984, 1985, and 1986, reported on Form 941, Employer's Quarterly Federal Tax Return, as follows:

<u>Tax Quarter Ending</u>	<u>Assessed Tax & Penalties</u>	<u>Federal Tax Deposits</u>	<u>Assessed Balance, Exclusive of Interest</u>
Dec. 1984	\$9,566.99	(\$6,547.85)	\$3,019.14
March 1985	\$6,271.54	(\$4,130.73)	\$2,140.81
June 1985	\$13,037.08	(\$7,828.87)	\$5,208.21
Sept. 1985	\$19,717.62	(\$10,844.85)	\$8,872.77
Dec. 1985	\$17,270.38	(\$10,902.99)	\$6,367.39
March 1986	\$10,619.27	(\$4,670.82)	\$5,948.45
June 1986	\$12,303.88	(\$9,383.93)	\$2,919.95 ¹³

13. On or about January 21, 1986, Robert Cook relinquished his equity and management positions in HRI.¹⁴

14. On or about February 14, 1986, HRI filed for Chapter 11 bankruptcy.¹⁵

15. Robert Cook, individually, HSI, Sharob Management, and Sharob Associates were creditors in the HRI bankruptcy.

¹³ Forms 4340, Certificates of Assessments, Payments, and Other Specified Matters, Sharob Management, Exhibits 19-25 to Plaintiff's Supplemental Statement.

¹⁴ R. Cook Dep. at 77-79, Exhibit 1 to Plaintiff's Supplemental Statement; Second Amended Disclosure at 5, Exhibit 9 to Plaintiff's Supplemental Statement.

¹⁵ R. Cook Dep. at 59, 77-79, Exhibit 1 to Plaintiff's Supplemental Statement; Second Amended Disclosure at 5, Exhibit 9 to Plaintiff's Supplemental Statement.

Neither Sharob Associates nor Sharob Management ever filed for bankruptcy.¹⁶

16. Robert Cook entered into a stipulation whereby HSI agreed to receive a \$50,000.00 distribution under the reorganization plan, Sharob Associates agreed to receive \$30,000.00 plus five percent of the sale of certain property up to \$75,000.00, and Robert Cook, HSI, Sharob Associates, and Sharob Management agreed to withdraw all remaining claims against HRI.¹⁷

17. Pursuant to HRI's reorganization plan, the United States had an allowed secured claim of \$378,970.38 representing HSI's unpaid federal employment taxes arising prior to November 1983.¹⁸

18. HSI's employment taxes arising prior to November 1983 were paid to the United States through HRI's chapter 11 reorganization plan, and Robert Cook's personal liability for the trust fund taxes incurred prior to November 1983 was abated at the conclusion of the plan.¹⁹

¹⁶ R. Cook Dep. at 60-62, Exhibit 1 to Plaintiff's Supplemental Statement.

¹⁷ Id. at 32; Stipulation and Order Regarding Claims of Historic Strasburg, Inc. Sharob Associates, Inc. Sharob Management Company and Robert Cook, Exhibit 10 to Plaintiff's Supplemental Statement.

¹⁸ R. Cook Dep. at 77-79, Exhibit 1 to Plaintiff's Supplemental Statement; Second Amended Disclosure Statement at 9, Exhibit 9 to Plaintiff's Supplemental Statement.

¹⁹ Request for Adjustment, Exhibit 7 to Plaintiff's Supplemental Statement.

19. No agent of the Internal Revenue Service ever lied, or made any affirmative misstatement, to Mr. Cook regarding the HRI bankruptcy.²⁰

20. On August 25, 1986, a delegate of the Secretary of the Treasury of the United States made an assessment in the amount of \$349,054.77 against defendant Robert Cook for the willful failure to collect, truthfully account for, and pay over, the withholding taxes of Sharob Associates.²¹

21. On August 3, 1987, a delegate of the Secretary of the Treasury of the United States made an assessment in the amount of \$47,764.12 against defendant Robert Cook for the willful failure to collect, truthfully account for, and pay over, the withholding taxes of Sharob Management.²²

22. On November 25, 1992, Robert and Sharon M. Cook met with Dennis J. White of the Internal Revenue Service regarding the Cooks' outstanding joint income tax liabilities for 1984, 1987, 1988, and 1989, as well as Robert Cook's outstanding trust fund liabilities arising from his role as officer of Sharob Associates and Sharob Management.²³

²⁰ R. Cook Dep. at 59, Exhibit 1 to Plaintiff's Supplemental Statement.

²¹ Form 4340, Certificate of Assessments, Payments, and Other Specified Matters, Robert Cook ("R. Cook Form 4340") at 8512, Exhibit 26 to Plaintiff's Supplemental Statement.

²² R. Cook Form 4340 at 8606, Exhibit 27 to Plaintiff's Supplemental Statement.

²³ R. Cook Dep. at 16-19, Exhibit 1 to Plaintiff's Supplemental Statement.

23. Mr. White told defendants that he had the power and authority to levy on their personal residence unless they entered into an installment plan on the joint tax liabilities and signed a Form 900 waiver extending the collection periods on the joint income tax liability until December 31, 2002.²⁴

24. Mr. White threatened to levy on defendants' personal residence if defendants failed to enter into an installment agreement for the payment of their joint tax liabilities.²⁵

25. As a condition to entering into an installment agreement on any joint income tax liabilities, the IRS required that the agreement include all outstanding tax liabilities of either defendant, including Mr. Cook's trust fund liabilities.²⁶

26. As further condition of any installment agreement, the IRS required defendants to waive the statutes of limitations on the collection periods for all defendants' individual and joint tax liabilities covered by the agreement.²⁷

27. On November 25, 1992, defendants signed a Form 900 waiver extending until December 31, 2002, the collection periods

²⁴ Id. at 17, 82-84.

²⁵ Testimony of Dennis J. White ("D. White") on January 21, 2004; Testimony of Robert G. Cook ("R. Cook") on January 21, 2004; Testimony of Sharon M. Cook ("S. Cook") on February 25, 2004.

²⁶ Testimony of D. White on January 21, 2004; Testimony of R. Cook on January 21, 2004; Testimony of S. Cook on February 25, 2004.

²⁷ Testimony of D. White on January 21, 2004; Testimony of R. Cook on January 21, 2004; Testimony of S. Cook on February 25, 2004.

for their joint income tax liability for the 1984, 1987, 1988, and 1989 tax years.²⁸

28. On December 4, 1992, Mr. Cook signed a Form 900 waiver extending until December 31, 2002, the collection periods on his § 6672 trust fund liabilities.²⁹

29. On March 16, 1998, December 13, 1999, and November 12, 2001, a delegate of the Secretary of the Treasury of the United States made assessments against defendants Robert and Sharon Cook for joint income taxes, penalties, and interest owed for the 1995, 1997, and 1999 taxable years.³⁰

30. On December 6, 2002, Revenue Officer Belinda Huber entered into defendants' account an internal transactional code which she could reverse at any time and which had no effect on the assessment to which it related.³¹

31. On February 3, 2003, the Government's computer automatically generated a credit to Mr. Cook's account when the IRS failed to input the pendency of this lawsuit into the computer in sufficient time for the computer to post it prior to the expiration of the collection statute on December 27, 2002.³²

²⁸ Tax Collection Waiver on Form 900, Robert and Sharon Cook, Exhibit 2 to Plaintiff's Supplemental Statement.

²⁹ Tax Collection Waiver on Form 900, Robert Cook, Exhibit 4 to Plaintiff's Supplemental Statement.

³⁰ Forms 4340, Certificates of Assessments, Payments, and Other Specified Matters, Robert and Sharon Cook, Exhibits 30-32.

³¹ Declaration of Belinda Huber ¶ 20, filed June 3, 2003 ("Huber Declaration").

³² Declaration of Theodore Wojciechowski ¶ 20, filed June 3, 2003 ("Wojciechowski Declaration").

CONCLUSIONS OF LAW

1. There are no genuine issues of material fact precluding this court from entering judgment as a matter of law.

2. Absent a valid waiver by defendant Robert Cook, the collection period ended on August 25, 1996, on the \$349,054.77 assessment made on August 25, 1986 by a delegate of the Secretary of the Treasury of the United States against Mr. Cook for the willful failure to collect, truthfully account for, and pay over, taxes required to be collected by Sharob Associates.³³

3. Absent a valid waiver by defendant Robert Cook, the collection period ended on August 3, 1997, on the \$47,764.12 assessment made on August 3, 1987 by a delegate of the Secretary of the Treasury of the United States against Mr. Cook for the willful failure to collect, truthfully account for, and pay over, taxes required to be collected by Sharob Management.³⁴

4. The collection periods on the August 25, 1986, and August 3, 1987, assessments against Mr. Cook for § 6672 trust fund liabilities were extended to December 31, 2002, by a valid waiver signed by Robert Cook on December 4, 1992.

5. The § 6672 trust fund liabilities alleged against Robert Cook in Counts I and II of the Complaint are enforceable against him.

³³ This penalty has a collection statute expiration date of ten years. 26 U.S.C. §§ 6672(b)(3) and (b)(4).

³⁴ This penalty has a collection statute expiration date of ten years. 26 U.S.C. §§ 6672(b)(3) and (b)(4).

SUMMARY JUDGMENT

Defendants styled their motion as one to dismiss pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. However, we converted defendants' motion to dismiss into a motion for summary judgment. The statute of limitations argument purportedly raised under Rule 12(b)(1) is more appropriately heard as a motion for summary judgment because it is grounded on defendants' affirmative defense and relies on numerous documents attached to defendants' motion.³⁵ See Hughes v. United States of America, 263 F.3d 272, 278 (3d Cir. 2001).

Moreover, those portions of defendants' motion that are purportedly raised under Rule 12(b)(6) must also be treated under a summary judgment standard pursuant to Rule 56.³⁶ Thus, in

³⁵ To the extent defendants raise any challenge to subject matter jurisdiction in their 12(b)(1) motion, we find that plaintiff has sufficiently alleged such jurisdiction in its Complaint. In that Complaint, plaintiff alleges federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331. Because the Complaint alleges three counts of tax recovery pursuant to 26 U.S.C. §§ 7401-7402 and 28 U.S.C. §§ 1331, 1340, and 1345, the Complaint sufficiently establishes subject matter jurisdiction.

³⁶ Where, in its motion, a defendant presents matters to the court which are outside the pleadings, the court should treat such motion as a motion for summary judgment. Fed. R. Civ. P. 12(b)(6).

In the instant case, defendants initially rely upon the Affidavit of Albert J. Wagner CPA in Support of 12(b)(6) Motion to Dismiss, Defendants' Individual Master File, and a letter from James P. Smith to Robert G. Cook dated June 6, 1989, which documents were attached to their motion to dismiss. In their brief in opposition to plaintiff's cross-motion, defendants again attached numerous exhibits, including the Affidavit of Robert G. Cook and Sharon M. Cook in Support of their Motion to Dismiss and in Opposition to the United States' Cross Motion for Summary Judgment. Defendants further rely upon the depositions of both Robert G. Cook and Sharon M. Cook, as well as numerous additional documents attached to their January 9, 2004 brief.

(Footnote 36 continues.)

considering defendants' motion to dismiss and plaintiff's cross-motion for summary judgment, the court may enter judgment in either party's favor where appropriate as a matter of law if the court finds no genuine issue of material fact.

DISCUSSION

As noted above and further explained below, this court finds that there are no genuine issues of material fact and that plaintiff is entitled to judgment as a matter of law. Accordingly, we grant plaintiff's cross-motion for summary judgment and deny defendants' motion to dismiss the Complaint.

Plaintiff's Prima Facie Case

Plaintiff argues that it is entitled to judgment in its favor because it has established a prima facie case of tax liability on all counts of the Complaint. Specifically, plaintiff argues that it has proven as a matter of law that defendant Robert Cook is liable on Count I for the underlying § 6672 assessment of \$349,054.77. On Count II, plaintiff argues that it has proven as a matter of law that Mr. Cook is liable for

(Footnote 36 continued.)

Because defendants have presented numerous documents beyond the pleadings in this action on which their motion is based, this court shall treat defendants' motion to dismiss as one for summary judgment. By setting a discovery and briefing schedule at the Rule 16 telephone conference, this court allowed all parties a reasonable opportunity to present all material made pertinent to such a motion by Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6).

the underlying § 6672 assessment of \$47,764.12. Finally, plaintiff argues that it has proven as a matter of law that defendants Robert and Sharon Cook are liable on Count III for the underlying joint income tax assessment of \$34,054.79. We agree.

The Secretary of the Treasury's determination that a taxpayer owes particular taxes, including interest, additions to tax, and assessable penalties imposed by the Internal Revenue Code is officially recorded as a tax assessment. 26 U.S.C. §§ 6201, 6203. See Cohen v. Gross, 316 F.2d 521, 522-23 (3d Cir. 1963). Thus, the assessments made against defendant Robert Cook pursuant to 26 U.S.C. § 6672, alleged in Counts I and II of the Complaint, reflect a determination by the Secretary of the Treasury that Mr. Cook willfully failed to collect, truthfully account for, and pay over, trust fund taxes in the amounts shown in the assessments.

The joint income tax assessments alleged in Count III of the Complaint also reflect a determination by the Secretary that defendants Robert and Sharon Cook jointly owe income taxes, interest, and penalties in the amounts shown in the assessments, plus statutory additions accruing to date. These assessments have the effect of reducing these tax liabilities to judgment. See Cohen, 316 F.2d at 522-23.

Presentation by the Government of a tax assessment creates "a rebuttable presumption . . . based, in part, on the probability of its correctness." The public policy bases of this

presumption are the goals of "requiring the taxpayer to meet certain bookkeeping obligations" and "recogniz[ing] that the taxpayer has more readily available to him the correct facts and figures." For taxes assessed pursuant to 26 U.S.C. § 6672, "the presumption appropriately requires that corporate officers explain their failure to perform duties imposed upon them by law." Psaty v. United States, 442 F.2d 1154, 1160 (3d Cir. 1971).

Given the policy behind the practice of assessments, the United States may establish its prima facie case by offering the assessment into evidence. 442 F.2d at 1159; United States v. Green, No. 01-CV-3849, 2002 U.S. Dist. LEXIS 21824, *9-11 (E.D. Pa. October 23, 2002).

Plaintiff in the instant case has introduced the August 25, 1986, and August 3, 1987, assessments against Robert Cook, as well as the March 16, 1998, December 13, 1999, and November 12, 2001, assessments against both Robert and Sharon Cook. Based on the presumption explained above, defendants bear the burdens of production and persuasion to deny judgment in plaintiff's favor. See Psaty, 442 F.2d at 1160. To overcome this presumption, defendants must present evidence other than self-serving statements, uncorroborated oral testimony, or tax returns demonstrating that plaintiff's assessments are invalid. See, e.g., Liddy v. Commissioner, 808 F.2d 312, 315 (4th Cir. 1986); Mays v. United States, 763 F.2d 1295, 1297 (11th Cir. 1985);

Griffin v. United States, 588 F.2d 521, 530 (5th Cir. 1979);
Lunsford v. Commissioner, 212 F.2d 878, 883 (5th Cir. 1954).

Because plaintiff has proven its prima facie claims under Counts I, II, and III, and because each defense raised by defendants fails for the reasons discussed below, we grant summary judgment in plaintiff's favor on all counts of the Complaint.

Plaintiff's Claims Are Not Time-Barred

Defendants challenge the sufficiency of Counts I and II of the Complaint by arguing that the relevant tax collection periods expired before plaintiff filed its Complaint on December 27, 2002. Defendants' argument fails as a matter of law for the reasons discussed below.

Defendants argue that the collection period on the \$349,054.77 assessment made on August 25, 1986 against Mr. Cook for the trust fund taxes of Sharob Associates ended on August 25, 1996 and that the collection period on the \$47,764.12 assessment made on August 3, 1987 against Mr. Cook for the trust fund taxes of Sharob Management ended on August 3, 1997.

Plaintiff opposes defendants' argument that Counts I and II are time-barred by relying on a waiver form signed by Robert Cook on December 4, 1992. This form extends the August 25, 1996, and August 3, 1997, collection periods for the § 6672 trust fund assessments until December 31, 2002. The government's

presentation of a waiver that is valid on its face places the burden on the taxpayer to prove that the waiver is ineffective. J.H. Rutter Rex Manufacturing Company v. Commissioner, 853 F.2d 1275, 1281 (5th Cir. 1988). Because we find that the waiver signed by Robert Cook is valid on its face, defendants bear the burden of proving that it is invalid.

Defendants counter plaintiff's waiver argument by arguing that: 1) the waiver tolled the collection periods only until December 6, 2002; 2) the District Director failed to sign the waiver form as required by 26 U.S.C. § 6502(a)(2); and 3) defendants' waiver was ineffectual because the form was signed under duress. As explained below, we disagree.

We find that the August 25, 1996, and August 3, 1997, tax collection periods were tolled by the waiver until December 31, 2002, on Counts I and II. Despite defendants' argument to the contrary, the waiver form specifically extends the relevant collection period until December 31, 2002. Such an extension is valid until that date, rather than December 4, 2002, because extensions of relevant collection periods obtained prior to December 31, 1999:

shall expire on the latest of -
 (A) the last day of such 10-year
 [collection] period;
 (B) December 31, 2002; or
 (C) in the case of an extension in
 connection with an installment agreement,
 the 90th day after the end of the period
 of such extension.

IRS Restructuring and Reform Act of 1998 ("RRA"), Pub L. No. 105-206, 112 Stat. 685.

Thus, the August 25, 1996 collection period applicable to Count I and the August 3, 1997 collection period applicable to Count II were extended until December 31, 2002 by a valid waiver signed by Robert Cook on December 4, 1992.

We further agree with plaintiff that the waiver form was not voided by the fact that the District Director did not personally sign it. Section 6502(a)(2) of Title 26 of the United States Code permits sub-delegation of the District Director's authority to sign waivers to agents of the Internal Revenue Service. Pennsylvania Transfer Company of Philadelphia, Inc. v. Whinston, 337 F. Supp. 122, 125 (E.D. Pa. 1972).

Moreover, an agent of the IRS who signs a waiver in an apparently regular manner is presumed to have the authority to do so. Lesser v. United States, 368 F.2d 306, 309 (2d Cir. 1966); see also R.H. Stearns Co. v. United States, 291 U.S. 54, 63, 54 S. Ct. 325, 328, 78 L. Ed. 647, 653 (1934). Because the waiver form at issue here was signed by Dennis White, a revenue officer of the IRS, and defendants have offered no evidence that Mr. White lacked the authority of the District Director to so sign, we find that the waiver form was validly signed, extending the relevant collection periods until December 31, 2002.

Finally, we find as a matter of law that Mr. Cook did not sign the waiver form under duress. The defense of duress is inapplicable where, as here, the threatened action alleged as coercive is lawful. See, e.g., Warner-Lambert Pharmaceutical Co.

v. Sylk, 471 F.2d 1137, 1143 (3d Cir. 1972); Kohen v. H.S. Crocker Co., 260 F.2d 790, 792 (5th Cir. 1958).

In the instant case, defendants argue that plaintiff coerced them into signing the waiver form related to Mr. Cook's trust fund liability by threatening to take away their house. Defendants argue that under Pennsylvania law, plaintiff was not entitled to seize their house, owned as tenants by the entirety, for the debt of only Robert Cook. See Napotnik v. Equibank and Parkvale Savings Association, 679 F.2d 316, 319 (3d Cir. 1982).

This argument fails. Pursuant to 26 U.S.C. § 6631, the IRS was lawfully entitled to levy on defendants' home because defendants were delinquent in paying their joint income taxes for the 1984, 1987, 1988, and 1989 tax years. As stated above, we find that Revenue Officer Dennis White did threaten to take such lawful action against defendants if they failed to enter into an agreement with the IRS to pay their joint income tax liability in installments.

As a condition to entering into such an agreement which would consequently prevent any levy upon defendants home, the IRS required defendants to include all of their outstanding individual and joint tax liabilities in any installment agreement. As a further condition intended to prevent a situation where defendants could not comply with an installment agreement after the collection periods on their liabilities

expired, the IRS required defendants to waive the expiration dates of all collection periods on any liabilities included in the agreement.

The practical consequence of Mr. Cook's refusal to waive the collection period on his individual tax liabilities would be the IRS' refusal to enter into the installment agreement, a position which the IRS is lawfully entitled to take. Defendants' inability to negotiate an installment agreement would open the door for the IRS to lawfully levy upon their jointly-owned home to satisfy their jointly-incurred tax liabilities for the 1984, 1987, 1988, and 1989 tax years.

While the consequences of defendants' tax liabilities may have been distasteful to defendants, it was certainly lawful for the IRS to pursue them. Because the IRS never threatened defendants with any unlawful action, the defense of duress fails.

Therefore, the waiver related to Mr. Cook's § 6672 liabilities validly extended the relevant collection periods until December 31, 2002. Because plaintiff filed its Complaint on December 27, 2002, before the collection periods expired, defendants' argument seeking judgment on Counts I and II as time-barred also fails.

Because Robert Cook signed a valid waiver extending the collection periods on his § 6672 trust fund liability, defendants have failed to demonstrate that plaintiff's claims are time-barred as a matter of law. Therefore, defendants are not entitled to summary judgment on Counts I and II.

The Liability of Sharon M. Cook on Counts I and II

Defendants move this court for summary judgment in favor of Sharon M. Cook on Counts I and II of the Complaint. Defendants argue that Counts I and II of the Complaint allege no liability as to Sharon M. Cook.

The court notes that Counts I and II of the Complaint are directed solely to defendant Robert G. Cook. Those counts of the Complaint cannot be read to allege any cause of action against Sharon M. Cook.

Because plaintiff has not named Mrs. Cook as a defendant to Counts I or II and seeks no damages from her on those counts, the court cannot enter judgment in her favor on Counts I and II. Therefore, defendants' argument seeking judgment for Sharon M. Cook on Counts I and II fails as a matter of law.

The Enforceability of Counts I and II Against Robert G. Cook

Defendants argue that Mr. Cook is entitled to judgment in his favor on Counts I and II of the Complaint because the § 6672 tax liabilities alleged therein are unenforceable. To that end, defendants argue that: 1) because defendants have insufficient assets, any liability should be discharged pursuant to 26 U.S.C. § 6325(a)(1); 2) internal IRS records indicate that these liabilities were discharged; 3) the debtor-in-possession - HRI - rather than Mr. Cook, should have been charged with this

trust fund liability; 4) plaintiff did not provide Mr. Cook with the requisite written notice of his personal liability for the trust fund delinquency; and 5) Mr. Cook was no longer responsible for the trust fund liability related to Sharob Associates or Sharob Management after he relinquished control of HRI on January 21, 1986. For the reasons explained below, defendants' arguments that the trust fund liability is not enforceable against Mr. Cook fail as a matter of law.

First, we reject defendants' argument that the trust fund liability of Robert Cook should be discharged because he has no assets. Other than the self-serving statement contained in Mr. Cook's affidavit, defendants have offered no evidence that Mr. Cook has no assets. Such evidence is insufficient to rebut the presumption created by plaintiff's presentation of the tax assessments. See, e.g., Liddy, 808 F.2d at 315; Mays, 763 F.2d at 1297; Griffin, 588 F.2d at 530; Lunsford, 212 F.2d at 883.

Moreover, defendants have pointed to no caselaw which requires the IRS to discharge as unenforceable unpaid tax liabilities because the taxpayer does not have the assets with which to pay the taxes. Thus, defendants' argument that plaintiff's claims are unenforceable because Robert Cook has no assets, fails as a matter of law.

Defendants also argue that Counts I and II of the Complaint are unenforceable because certain internal IRS records indicate that defendants' liabilities were discharged.

Specifically, defendants cite a "code 530" entered on Robert Cook's transcript of account on December 6, 2002 and a "code 608" entered on that account on February 3, 2003 as demonstrating that the IRS has abated Mr. Cook's debts and admitted that the collection period expired. However, the credit of a taxpayer's account inadvertently made and unsupported by any statutory cause for abatement cannot constitute an abatement. Bugge v. United States, 99 F.3d 740, 744 (5th Cir. 1996).

Moreover, the IRS maintains the authority to make ministerial adjustments to its accounts and may correct adjustments made in error. Simon v. United States, 261 F. Supp. 2d 567, 573 (M.D. La. April 21, 2003). Additionally, a clerical error that is administrative rather than substantive has no legal effect on an assessment against a taxpayer, absent a showing of some prejudice. Crompton-Richmond v. United States, 311 F. Supp. 1184, 1186 (S.D.N.Y. 1970); Internal Revenue Service v. Koff, No. 00-CV-1954, 2002 U.S. Dist. LEXIS 8947, *12-13 (E.D. Cal. March 1, 2002).

On December 6, 2002, Revenue Officer Belinda Huber entered an internal, transactional code which she could reverse at any time and which had no effect on the assessment to which it related.³⁷ On February 3, 2003, the computer automatically generated a credit to Mr. Cook's account when the IRS failed to

³⁷ Huber Declaration ¶ 20.

input the pendency of this lawsuit into the computer in sufficient time for the computer to post it prior to the expiration of the collection statute on December 27, 2002.³⁸

We find that these ministerial, administrative transactions do not constitute abatements and have no effect on the valid assessments discussed above. Thus, we reject defendants' argument that the trust fund tax assessments against Robert Cook are unenforceable because these transactions abated the trust fund liability.

Moreover, defendants' argument that these transaction codes altered the expiration dates of the relevant collection periods also fails because a collection period may only be extended by agreement of the parties pursuant to 26 U.S.C. § 6502(a). Because the entry of a transaction code into the records of the IRS is not a statutorily permissible method for extending a collections period, these transactions could not alter the collection periods at issue. Thus, defendants' argument that they are entitled to judgment because the IRS made ministerial adjustments to Mr. Cook's account, fails as a matter of law.

Next, defendants argue that the debtor-in-possession - HRI - rather than Robert Cook, should have been charged with the trust fund liability alleged in Counts I and II. For the

³⁸ Wojciechowski Declaration ¶ 12.

following reasons, this argument also fails. Trust fund liability attaches to a taxpayer if he: 1) was a person required to collect, truthfully account for, and pay over trust fund taxes; and 2) willfully failed to collect, truthfully account for, or pay over trust fund taxes. 26 U.S.C. § 6672.

Section 6672 liability is distinct from the employer's liability for the trust fund taxes, and the IRS is not required to attempt to collect such taxes from the employer before seeking to hold another individual liable under 26 U.S.C. § 6672. Datlof v. United States, 370 F.2d 655, 656 (3d Cir. 1966). Robert Cook is, therefore, not relieved of liability just because plaintiff could have sought to hold HRI liable as well. Thus, we reject defendants' argument on this point.

Defendants next argue that the trust fund debt is unenforceable because plaintiff did not provide defendant with written notice of his personal liability on the trust fund taxes as required by 26 U.S.C. § 6672(b)(2). This argument fails because defendants rely upon an amended section of the Internal Revenue Code that was not enacted until 1996 and which applies only to assessments made after June 30, 1996, well after the trust fund deficiencies were assessed against defendant Robert G. Cook personally.

At the time of the § 6672 assessments against Robert Cook, plaintiff was not required to provide defendant with written notice of his personal liability for the trust fund

deficiencies of Sharob Associates and Sharob Management. Thus, defendants' arguments that the trust fund assessments alleged in Counts I and II are unenforceable because of lack of notice, fail as a matter of law.³⁹

Finally, defendants argue that plaintiff's claims in Counts I and II are unenforceable to the extent that they include liability for delinquencies incurred after Robert Cook relinquished control of HRI on January 21, 1986. This argument fails because defendants have offered no evidence that Mr. Cook relinquished control of Sharob Management or Sharob Associates prior to the assessments made in 1986 or 1987.

In his own deposition, Mr. Cook admits to having controlled Sharob Associates and Sharob Management from their inceptions to their dissolutions.⁴⁰ Mr. Cook's relationship to HRI at the time of these assessments is wholly irrelevant to Mr. Cook's admitted control of the two Sharob entities which incurred the withholding tax liabilities. Thus, defendants' argument that plaintiff's claims are unenforceable because Mr. Cook relinquished control of HRI on January 21, 1986, fails as a

³⁹ The court notes that plaintiff argues that it nonetheless satisfied the notice requirements of the 1996 amendments to 26 U.S.C. § 6672(b)(2). Given the court's finding that plaintiff was not required to provide the notice demanded, we decline to reach this argument.

⁴⁰ R. Cook Dep. at 60-61, Exhibit 1 to Plaintiff's Supplemental Statement.

matter of law.⁴¹

Because defendants have failed to prove that plaintiff's claims in Counts I and II are unenforceable for the reasons explained above, defendants are not entitled to judgment as a matter of law on this basis.

The Application of Joint Tax Payments to Joint Tax Indebtedness

Defendants argue that they are entitled to judgment in their favor on Count III of the Complaint because the joint tax liability alleged is inaccurate and reflects a misapplication of joint tax payments to Mr. Cook's sole trust fund liability. As explained above, plaintiff has established a prima facie case of defendants' liability for the joint income tax deficiencies alleged in Count III. Moreover, plaintiff enjoys the presumption that the amounts reflected in the assessments are accurate. Because defendants have failed to meet their burden of proving any alleged inaccuracies, this argument fails as a matter of law as explained below.

To demonstrate that plaintiff incorrectly applied defendants' joint income tax payments to the § 6672 trust fund

⁴¹ For the same reasons that Mr. Cook's act in relinquishing control of HRI in 1986 are irrelevant to this action, so too is the fact of HRI's bankruptcy. HRI is a separate legal entity, distinct from Sharob Associates and Sharob Management. Defendants have presented no evidence that the tax liabilities of Robert Cook, Sharob Associates, or Sharob Management were ever discharged through any bankruptcy proceedings involving any of those entities as debtors. Defendants' claim that Mr. Cook's tax liabilities were somehow discharged by the bankruptcy of HRI is unfounded.

liability of Mr. Cook, defendants rely on a letter dated October 16, 1996 from Robert Singleton, on defendants' behalf, to Belinda Huber requesting confirmation from plaintiff that certain joint tax payments allegedly made in 1995 and 1996 were credited to the joint tax deficiencies. Defendants further rely on a Notice from the IRS to Robert and Sharon Cook dated October 25, 1995 to prove their case.

Initially, we note that the evidence presented by defendants does not establish that defendants ever made any installment payments to the IRS. The evidence demonstrates only an allegation from an agent of defendants that they made several installment payments in 1995 and 1996 and that the IRS sent notices to defendants to timely remit their installment payments. Defendants' have presented no cancelled check deposited by plaintiff nor a corresponding accounting from plaintiff omitting such payment, as would sufficiently demonstrate that plaintiff failed to properly credit defendants for payments made on their joint tax liability.

Next, we note that even if defendants could corroborate those payments allegedly demonstrated by the evidence presented, according to defendants, such payments were made pursuant to an installment agreement related to numerous tax years preceding 1990. The application or misapplication of any payment under this installment agreement may effect the validity of assessments for those taxable years, but has no bearing on the validity of

the assessments for the years ending 1995, 1997, and 1999 at issue in Count III. Thus, defendants have failed to overcome the presumption of an accurate assessment established by plaintiff in Count III.

CONCLUSION

For all the foregoing reasons, we deny defendants' motion to dismiss the Complaint. We grant plaintiff's cross-motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. We enter judgment in favor of plaintiff and against defendant Robert G. Cook on Counts I and II of the Complaint and against both defendants Robert G. Cook and Sharon M. Cook on Count III of the Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)
) Civil Action
Plaintiff,)
)
vs.) No. 02-CV-09475
)
ROBERT G. COOK and)
SHARON M. COOK,)
)
Defendants.)

O R D E R

NOW, this 22nd day of March, 2004, upon consideration of the Rule 12(b)(1) and (6) Motion to Dismiss Complaint, which motion was filed by defendants on April 14, 2003; the United States' Cross-Motion for Summary Judgment, which cross-motion was filed June 3, 2003; the Answer of Defendants to United States Cross Motion for Summary Judgment, which answer was filed August 5, 2003; the United States' Reply Brief re: Cross-Motions for

Summary Judgment, which reply brief was filed August 27, 2003;¹ the Defendants' Brief on Motion for Summary Judgment and on United States' Cross Motion for Summary Judgment Submitted on or before January 9, 2004 per Court Order, which brief was filed January 9, 2004; the Supplemental Statement of Facts and Exhibits in Support of United States' Cross-Motion for Summary Judgment, which statement was filed by plaintiff January 9, 2004; and the Supplemental Memorandum of Law in Support of United States' Cross-Motion for Summary Judgment, which brief was filed by plaintiff on January 9, 2004; after a hearing held January 21, 2004 and February 25, 2004; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendants' motion to dismiss the Complaint is denied.

IT IS FURTHER ORDERED that plaintiff's cross-motion for summary judgment is granted.

IT IS FURTHER ORDERED that judgment in the amount of \$1,536,787.13² is entered in favor of plaintiff and against defendant Robert G. Cook on Count I of the Complaint as follows:

1) \$349,054.77 for the August 25, 1986 assessment against Robert Cook pursuant to 26 U.S.C. § 6672 for

¹ The court granted plaintiff leave to file a reply brief by Order dated August 21, 2003.

² This figure reflects the \$1,543,268.06 awarded below (the total of subparagraphs 1), 2) and 3)), offset by \$6,480.93 in credits and adjustments applied against that balance since the original assessment on August 25, 1986.

the willful failure to collect, truthfully account for and pay over taxes required to be collected by Sharob Associates, Inc.;

2) \$1,194,078.79 in interest calculated pursuant to 26 U.S.C. §§ 6621(a) and (b) and § 1247(d) and compounded daily from August 25, 1986 to March 22, 2004; and

3) \$134.50 in lien fees and collection costs incurred after the August 25, 1986 assessment.

IT IS FURTHER ORDERED that judgment in the amount of \$191,706.61³ is entered in favor of plaintiff and against defendant Robert G. Cook on Count II of the Complaint as follows:

1) \$47,764.12 for the August 3, 1987 assessment against Robert Cook pursuant to 26 U.S.C. § 6672 for the willful failure to collect, truthfully account for and pay over taxes required to be collected by Sharob Management Company, Inc.;

2) \$147,835.73 in interest calculated pursuant to 26 U.S.C. §§ 6621(a) and (b) and § 1247(d) and compounded daily from August 3, 1987 to March 22, 2004; and

3) \$42.00 in lien fees and collection costs incurred after the August 3, 1987 assessment.

IT IS FURTHER ORDERED that judgment in the amount of \$35,138.63⁴ is entered in favor of plaintiff and against

³ This figure reflects the \$195,641.85 awarded below (the total of subparagraphs 1), 2) and 3)), offset by \$3,935.24 in credits and adjustments applied against that balance since the original assessment on August 3, 1987.

⁴ This figure reflects the \$58,218.95 awarded below (the total of subparagraphs 1) through 11)), offset by \$11,481.51 in credits and adjustments applied against the March 16, 1998 assessment, \$10,918.00 in credits and

defendants Robert G. Cook and Sharon M. Cook, jointly and severally, on Count III of the Complaint as follows:

1) \$15,773.34 for the March 16, 1998 assessment against defendants for their jointly-owed income tax for the tax year ending December 1995, including interest and penalties included in that assessment;

2) \$2,378.36 in penalties for the tax year ending December 1995, which penalties were incurred after the March 16, 1998 assessment;

3) \$4,938.24 in interest on the March 16, 1998 assessment, calculated pursuant to 26 U.S.C. §§ 6621(a) and (b) and § 1247(d) and compounded daily from March 16, 1998 to March 22, 2004;

4) \$73.00 in lien fees and collection costs related to the tax year ending December 1995 incurred after the March 16, 1998 assessment;

5) \$16,441.72 for the December 13, 1999 assessment against defendants for their jointly-owed income tax for the tax year ending December 1997, including interest and penalties included in that assessment;

6) \$1,255.57 in penalties for the tax year ending December 1997, which penalties were incurred after the December 13, 1999 assessment;

adjustments applied against the December 13, 1999 assessment, and \$680.81 in credits and adjustments applied against the November 12, 2001 assessment.

7) \$2,994.71 in interest on the December 13, 1999 assessment, calculated pursuant to 26 U.S.C. §§ 6621(a) and (b) and § 1247(d) and compounded daily from December 13, 1999 to March 22, 2004;

8) \$11,697.48 for the November 12, 2001 assessment against defendants for their jointly-owed income tax for the tax year ending December 1999, including interest and penalties included in that assessment;

9) \$1,133.93 in penalties for the tax year ending December 1999, which penalties were incurred after the November 12, 2001 assessment;

10) \$1,506.35 in interest on the November 12, 2001 assessment, calculated pursuant to 26 U.S.C. §§ 6621(a) and (b) and § 1247(d) and compounded daily from November 12, 2001 to March 22, 2004; and

11) \$26.25 in lien fees and collection costs related to the tax year ending December 1999, which fees were incurred after the November 12, 2001 assessment.

BY THE COURT:

James Knoll Gardner

United States District Judge